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REMARKS

## Restriction/Election

The Examiner has required restriction to one of the following inventions under 35 U.S.C. 121:

- I. A compound of formula I wherein  $R^1$  is hydrogen, C1-10 acyl or C1-10 alkoxy carbonyl.
- II. A compound of formula I wherein  $R^1$  is  $COR^4$ .

Furthermore the restriction requirement requires that when the election of one of Groups is made, an election of a single compound is further required including an exact definition of each substitution on the base molecule (Formula (I)), wherein a single member of each substituent group or moiety is selected.

Applicants elect Group II, drawn to products of the formula I wherein  $R^1$  is  $COR^4$ , with traverse. Claims 3-8 and 12 have been canceled herein to comply with the restriction requirement; however, Applicants reserve the right to re-introduce the canceled claims in this or a subsequent divisional application. In compliance with the requirement to elect a species, Applicants elect compound 5 ( $R^1 = COR^4$ ,  $R^2 = R^3 = H$ ,  $R^4 = CH(R^5)NH_3^+ Cl^-$ ,  $R^5 = CHMe_2$ ) in Table 1 (which also is depicted in Example 7).

Applicants respectfully traverse the restriction requirement on the grounds that it requiring restriction of this generic formulation does not conform to U.S. Patent Office policy as set forth in the MPEP.

The grounds for requiring restriction set for in the Office Action appear to be that "[t]he species are independent or distinct because the products encompass embodiments that are NOT required to perform the common utility." This basis for restriction does not appear in the MPEP and, fact, the only occurrence of the phrase "common utility" would appear to argue against the propriety of the restriction.

Since the decisions in *In re Weber* and *In re Ilaas*, it is improper for the Office to refuse to examine that which applicants regard as their invention, unless the subject matter in a claim lacks unity of invention. Broadly, unity of invention exists where compounds included within a Markush group (1) share a common utility, and (2) share a substantial structural feature essential to that utility. (MPEP §803.02, citations omitted)

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The present invention relates to prodrugs of a single non-natural nucleoside compound and therefore the species clearly have a common structural feature. They are all useful as antiviral agents and thus the species have a common utility. Following the logic of the restriction requirement any generic chemical formula, independent of any other factor, could be subject to restriction into each individual species which could be used separately.

Furthermore the Office Action has failed to meet the burden imposed in §808.02 of the MPEP. There is no indication that the species are classified separately, that they have a separate status in the art when they are classified together, or that they require a different field of search. In addition there is no evidence that searching the entire generic would impose an undue burden.

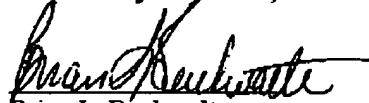
Applicants request reconsideration of the restriction requirement and examination of the Markush structure in claim 1 as filed.

#### CONCLUSION

Applicants respectfully submit that with the election of a group and a species with traverse, this response meets requirements set forth in the MPEP and the application is in condition for examination. Any questions regarding the application may be directed to the undersigned at the telephone or email addresses given below. If the Examiner believes a telephone conference would expedite prosecution of this application, please telephone or email the undersigned.

No fees should be due. However, in the event it is determined that a fee is due, please charge same to Deposit Account No. 18-1700.

Respectfully submitted,



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